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476-135—72——1

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-105

CAPITAL ASSISTANCE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND SMALL BUSINESS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is not reported. The order of the district court (Pet. App. A) and its findings of fact and conclusions of law (App., *infra*, pp. 11–16) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1972. The petition for a writ of certiorari was filed on July 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the determination of the Administrator of the Small Business Administration under 15 U.S.C. 683(b) not to extend a prior loan to a small business investment company is subject to judicial review.

STATUTES INVOLVED

15 U.S.C. 683(b) (1964 ed.) provided:[1]

> (b) To encourage the formation and growth of small business investment companies, the Administration is authorized (but only to the extent that the necessary funds are not available to the company involved from private sources on reasonable terms) to lend funds to such companies either directly or by loans made or effected in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred (standby) basis. Such loans shall bear interest at such rate (in no case lower than the average investment yield, as determined by the Secretary of the Treasury, on marketable obligations of the United States outstanding at the time of the loan involved) and contain such other terms as the Administration may fix, and shall be subject to the following restrictions and limitations:
>
> * * * * * * *
>
> (2) All loans made under this subsection (b) shall be of such sound value as reasonably to assure repayment.

[1] The statute was applicable during the period at issue here. To the extent here pertinent, the amended version of 15 U.S.C. 683(b), enacted October 11, 1967, is not materially different.

15 U.S.C. 687(d) provides:

> (d) FORFEITURE OF RIGHTS, PRIVILEGES, AND FRANCHISES; JURISDICTION.
>
> Should any small business investment company violate or fail to comply with any of the provisions of this Act or of regulations prescribed hereunder, all of its rights, privileges, and franchises derived therefrom may thereby be forfeited. Before any such company shall be declared dissolved, or its rights, privileges, and franchises forfeited, any noncompliance with or violation of this Act shall be determined and adjudged by a court of the United States of competent jurisdiction in a suit brought for that purpose in the district, territory, or other place subject to the jurisdiction of the United States, in which the principal office of such company is located. Any such suit shall be brought by the United States at the instance of the Administration or the Attorney General.

STATEMENT

Petitioner, Capital Assistance Corporation (CAC), is a small business investment company (SBIC) licensed by the Small Business Administration (SBA), pursuant to the Small Business Investment Act, 15 U.S.C. 661, *et seq.* In March 1961, the SBA purchased a subordinated 20-year debenture from petitioner in the principal amount of $150,000 (p. 12, *infra;* R. 5).[2] The debenture contained an acceleration clause providing that the indebtedness could be declared immediately due and payable in the event

[2] "R." refers to the record in the court of appeals.

petitioner violated any provision of the Act or any regulation thereunder, or defaulted upon any note or obligation. In January 1962, the SBA also made a five-year loan to petitioner in the amount of $150,000, with the principal due January 16, 1967 (p. 12, *infra*).

Prior to January 16, 1967, petitioner applied for an extension of the five-year loan (p. 13, *infra*). The SBA initially advised petitioner that it would defer a decision on the refinancing of the loan until the outcome of certain administrative proceedings being brought against petitioner, in which it was alleged that petitioner had permitted an unlawful impairment of its capital (p. 14, *infra*). However, in March 1967, SBA notified petitioner that the loan would not be renewed (p. 14, *infra*). By letter of April 25, 1967, in response to petitioner's protest, the Administrator explained to petitioner that the decision not to extend the loan was in no way based on the charges against petitioner in the pending administrative action, but rather was based upon a credit judgment made after analysis of petitioner's operation and portfolio (p. 14, *infra;* R. 104).[3]

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[3] The Administrator relied on the following factors (R. 104):

"1. Four and a half successive years of deficit operations.

"2. A portfolio of loans and investments, as shown on the SBA Form 468 as of September 30, 1966, in the amount of $467,522, consisting of (1) $365,002 of assets acquired in liquidation of loans and debt securities, (2) a $48,000 investment for which a 100 percent allowance for losses has been established. (3) a portfolio company, with loans and investments from the Licensee of $20,450, which is delinquent in its interest payments to the extent of $5,006, (4) a $7,670 investment in a portfolio company of which the Licensee has 100 percent of the stock and has established a reserve for losses of $4,486 (a judgment

When the petitioner failed to pay the $150,000 indebtedness which had fallen due on the loan, the SBA exercised its right to accelerated payment of the 20-year debenture (p. 14, *infra*). Petitioner's indebtedness to the SBA thus totaled $300,000.

The United States, on behalf of the SBA, then filed a complaint in the district court in November 1967, alleging that by virtue of the unpaid indebtedness, petitioner was in violation of the Small Business Investment Act and the regulations promulgated thereunder. Pursuant to 15 U.S.C. 687(d), the SBA sought appointment of itself as receiver of petitioner, to take possession of its property and to liquidate its assets. The SBA further sought judgment against petitioner in the amount of $300,000.[4] Petitioner in its answer admitted its indebtedness to the SBA, but in a coun-

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for $7,670 has been obtained by the Licensee) and (5) stock in a hospital which has recently turned the corner and is now operating profitably. The remaining loan is being liquidated on schedule.

"3. Retained earnings of $12,098, which includes non-cash realized gains of approximately $280,000.

"4. Inability or unwillingness to increase private capitalization of Licensee.

"5. Little apparent capability of repaying indebtedness if extended to February 28, 1969."

[4] As a result of the filing of the court action by the United States, the administrative proceedings which were pending against petitioner were dismissed by the Administrator in December 1967, for mootness (p. 13, *infra*). At the time of the dismissal, to which petitioner raised no objection, the SBA was petitioning for review of a hearing examiner's decision which held that, while petitioner's conduct violated SBA policy releases, those releases became effective only after petitioner's alleged improper conduct had taken place and therefore penalties should not be imposed (R. 47–50, 80).

terclaim alleged that the SBA's decision not to refinance the loan was arbitrary and capricious, and petitioner sought a declaration that it was entitled to the refinancing of its loan.

The district court entered summary judgment in favor of the SBA (Pet. App. A; pp. 11–16, *infra*). The court found that petitioner had violated the Small Business Investment Act by its failure to pay its note at maturity. The court entered judgment in favor of the United States for approximately $300,000 due on petitioner's two debts to the SBA. The district court also ordered appointment of the SBA as a receiver, and authorized the receiver to liquidate petitioner's assets. The court additionally authorized the SBA to revoke petitioner's license under the Act. The court also dismissed petitioner's counterclaim.

The court of appeals affirmed the district court's order. The court ruled that under 15 U.S.C. 683(b) the question whether to renew the loan was vested in the sole discretion of the Administrator and not subject to judicial review (Pet. App. B).

ARGUMENT

1. Petitioner in its answer in the district court conceded its unpaid indebtedness on the $150,000 loan which fell due on January 16, 1967 (R. 13–14). This default constituted a violation of 13 C.F.R. 107.903 (1967), which specifies that small business investment companies must meet all obligations relating to their indebtedness to the SBA. The statutorily imposed sanction for this violation of the regulation is that the Administrator is entitled, under 15 U.S.C. 687(d), to

bring proceedings to revoke the "rights, privileges and franchises" of petitioner.

Petitioner does not deny that proceedings under 15 U.S.C. 687 may be brought against a small business investment company that fails to pay its indebtedness. But petitioner asserts that the alleged arbitrary denial of its request to renew the loan may be asserted as a defense to the action. This claim is without merit.

Under the Administrative Procedure Act, 5 U.S.C. 701(a), judicial review of administrative agency action is not available where the action at issue "is committed to agency discretion by law." While the statute creates a "narrow exception" to the general rule authorizing judicial review (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410), it is nevertheless applicable when the statute vesting authority in the particular agency is couched in "permissive terms * * * [which] persuasively indicate that * * * [its] administration was committed entirely to the discretionary judgment of the * * * [agency] 'without the intervention of the courts'" (*Schilling* v. *Rogers*, 363 U.S. 666, 674).

Section 683(b), *supra*, broadly authorizes the Administrator to make loans when convinced that the loans are of "such sound value as reasonably to assure repayment." This is the kind of determination that necessarily turns on an exercise of judgment by the administrator that is to be made in light of the funds available for the SBIC program, and is inherently discretionary. Where, as here, the only issue involves the Administrator's determination whether a loan is

"of such sound value as reasonably to assure repayment," it is plain that "there is no law to apply" (cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 410), and that Congress did not intend to permit courts to substitute their judgment for that of the Administrator. See *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317; *Schilling* v. *Rogers*, 363 U.S. 666, 674; *Ferry* v. *Udall*, 336 F. 2d 706 (C.A. 9), certiorari denied, 381 U.S. 904; *von Lusch* v. *Hoffmaster*, 253 F. Supp. 633 (D. Md.)

Petitioner's arguments to the contrary are unpersuasive. The excerpt from the legislative history of the Small Business Investment Act of 1961, cited by petitioner as indicative of congressional intent to provide judicial review of SBA decisions (Pet. 15), does not involve the provisions of the Act authorizing SBA loans, but rather relates to the procedure for the suspension of SBIC licenses as a result of specified wrongdoing. While specific provision is made for judicial review of administrative determinations suspending licenses (15 U.S.C. 687) and of certain other determinations (Pet. 11), there is no specific provision for judicial review of the Administrator's determination not to approve or renew a loan. The absence of such a provision where "Congress was [obviously] advertent to the role of courts * * * strongly indicates a legislative purpose that there be no such participation." *Schilling* v. *Rogers*, 363 U.S. 666, 674.[5]

[5] The decisions of the Court upon which petitioner relies (Pet. 10) are not to the contrary. They involve statutory grants of administrative authority different from that present here, and each turned on an individual assessment of whether "Con-

2. Petitioner's remaining contentions—that the government is estopped to enforce the terms of its loans, and that its license was "revoked" without due process—are without merit. While petitioner made the bald claim that it was led to believe by certain correspondence that the SBA would renew its loan if petitioner escaped sanctions in the administrative proceeding, the correspondence relied upon stated, among other things, that "SBA will make a credit judgment on each application taking into consideration the past and current financial position and results of operations of the SBIC" (R. 141); and "Licensees are reminded that operating loans now approaching maturity are due and payable at maturity" (R. 142).[6] Furthermore, the non-renewal of the loan was in no way a "revocation" of petitioner's license. *Hamlin Testing Laboratories, Inc.* v. *United States Atomic Energy Comm.*, 357 F. 2d 632, 638 (C.A. 6); cf. *Bd. of Regents* v. *Roth*, No. 71–162, decided June 29, 1972. Authority to revoke petitioner's license was granted pursuant to 15 U.S.C. 687(d) only after a judicial determination that petitioner had violated SBA regulations by its default on the loan.

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gress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion." *Barlow* v. *Collins*, 397 U.S. 159, 165. In the *Barlow* case (p. 166), for example, the "principal dispute relate[d] to the meaning of [a] statutory term" which was to be resolved "not on the basis of matters within the special competance of the Secretary, but by judicial application of canons of statutory construction." Cf. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136; *Data Processing Service* v. *Camp*, 397 U.S. 150; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402.

[6] Petitioner also relied below, for its estoppel argument, on the contention that with SBA's knowledge it made long-term

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1972.

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loans, and became locked into a position in which it could not repay SBA. That argument is without substance. The Act and SBA regulations contemplate that SBIC's will make long-term loans of 5 years or more. 15 U.S.C. 684–685; 26 Fed. Reg. 8236–8237 (1961). Thus when petitioner obtained the loan, which it agreed to repay in five years, it was aware that, while it could make longer-term investments in small businesses, it would be required to repay the SBA loan in five years. Petitioner was not free to treat its 5-year loan as one for a longer period. Instead it was required to either (1) generate enough income to pay off its loans; or (2) attract additional private capital; or (3) satisfy the SBA that it was entitled on its merits to renewed or additional financing.

APPENDIX

United States District Court for the
Northern District of California
Civil No. 48184

UNITED STATES OF AMERICA, PLAINTIFF

v.

CAPITAL ASSISTANCE CORPORATION, A CALIFORNIA CORPORATION, DEFENDANT AND COUNTERCLAIMANT

v.

SMALL BUSINESS ADMINISTRATION, COUNTERCLAIM DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for hearing before the Court on the Motion of Plaintiff for summary judgment and the Motion of Plaintiff and Counter claim Defendant for dismissal of counterclaim; and

The Motions having been made on behalf of Plaintiff and Counterclaim Defendant after due notice and the matter having been argued and submitted to the Court; and

The Court having duly considered the arguments and authorities submitted by counsel, the Court herein makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Capital Assistance Corporation (CAC) is a small business investment company licensed by the Small

Business Administration (SBA), pursuant to the provisions of the Small Business Investment Act of 1958, as amended (Act). Its principal place of business is located in San Francisco, California.

2. SBA purchased a subordinated debenture from the defendant, CAC, dated March 28, 1961, in the principal amount of $150,000. The debenture provides that the indebtedness evidenced thereby may be declared to be immediately due and payable in the event that the defendant, CAC, violates any provision of the Act or any regulation promulgated thereunder or defaults under any note or obligation issued by the defendant, CAC.

3. SBA made a loan of $150,000 to defendant, CAC, as evidenced by a Note and a Loan Agreement, both dated January 16, 1962. The Note provides that the indebtedness evidenced thereby shall be immediately due and payable without notice or demand in the event of a violation by defendant, CAC, of any provision of the Note, the Act, or any regulation promulgated thereunder.

4. Pursuant to the provisions of the aforesaid loan made to defendant, CAC, by the SBA on January 16, 1962, the defendant, CAC, promised to pay the Small Business Administration the principal amount of $150,000 on January 16, 1967.

5. On January 16, 1967, and at any time since, the defendant, CAC, pursuant to the provisions of the aforesaid loan, has failed to pay $150,000 to the SBA, or any part thereof.

6. The defendant, CAC, was the subject of an Order to Show Cause issued by SBA on April 4, 1966, entitled *In the Matter of Capital Assistance Corporation*, Docket No. 66–7, alleging that the capital of the defendant, CAC, was impaired within the meaning of Section 107.303 of the Regulations promulgated by

SBA in that its retained earnings deficit exceeded 50 percent of its paid-in capital and paid-in surplus.

7. On December 11, 1967, Counsel for the SBA made a Motion to Dismiss the aforesaid Order to Show Cause, stating as reasons that the issues and remedy sought have become moot by the institution of the subject civil action. Counsel for the defendant, CAC, had no objection to the granting of the aforesaid Motion.

8. On December 27, 1967, R. C. Moot, Administrator of SBA, issued an Order granting the aforesaid Motion to Dismiss, stating that the institution of the subject litigation rendered moot the issues and remedy sought in the Administrative proceedings.

9. The defendant, CAC, in August 1966, requested from SBA an extension of the terms of the aforesaid $150,000 loan for fifteen years and was advised by the SBA of the procedure then in effect to follow with respect to its request for the refinancing of the aforesaid loan.

10. In November 1966, SBA returned to the defendant, CAC, its application, with supporting documents, concerning the refunding of the aforesaid loan and advised that SBA would no longer make loans of fifteen years' duration and the defendant, CAC, would be advised of the policies and procedures which were presently in the course of preparation.

11. SBA advised the defendant, CAC, of its new policy and procedure with respect to its lending program in a Policy and Procedural Release, No. 2010, released on November 30, 1966.

12. The aforesaid Policy and Procedural Release provides, among other things, that SBA will make a credit judgment on each application, taking into consideration the past and current financial position and results of operations of the Licensee.

13. The aforesaid Policy and Procedural Release was transmitted by the SBA to the defendant, CAC, in December 1966, and was received by the defendant, CAC.

14. In January 1967 SBA advised the defendant, CAC, that any action with respect to the aforesaid $150,000 loan would be deferred until the Administrative Proceeding concerning the defendant, CAC, had been concluded and a decision rendered.

15. On February 24, 1967, the Hearing Examiner issued an Initial Decision and Order with respect to the aforesaid Administrative Proceeding.

16. On March 21, 1967, SBA advised the defendant, CAC, that it had determined, in view of the adverse conditions of the defendant's operations and financial status, it would not be in the best interest of the Agency to extend the aforesaid loan of $150,000 and requested repayment of said loan.

17. On April 25, 1967, SBA advised the defendant, CAC, that its decision not to extend the aforesaid $150,000 loan was neither capricious, arbitrary, nor based upon any allegations alleged in the aforesaid Administrative Hearing and that such decision was based upon a credit judgment made after careful analysis of the defendant's operation and portfolio.

18. By letter dated May 11, 1967, the SBA notified the defendant, CAC, that all indebtedness, including principal and accrued interest evidenced by the debenture and the Note, was immediately due and payable, and made demand for payment in full.

19. It appears that this Court should enjoin Capital Assistance Corporation, and all of its officers, directors, agents and employees and anyone acting in concert therewith, from disposing of any of its assets, from further investment of its funds, and from either directly or indirectly taking any actions or causing

any actions to be taken which would dissipate the assets and property of defendant, Capital Assistance Corporation, to the detriment of its creditor, the United States of America, or the Receiver appointed in the cause, and from further violating the Small Business Investment Act.

20. It further appears that this Court should take exclusive jurisdiction of Capital Assistance Corporation and all of its assets, and in furtherance thereof appoint a Receiver of all of the assets and property of Capital Assistance Corporation.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties to this suit and the subject matter herein.

2. This Court is authorized to grant the relief requested in the complaint filed herein.

3. The United States of America is entitled to a money judgment for financing extended by the Small Business Administration to Capital Assistance Corporation.

4. Capital Assistance Corporation's failure to pay its Note due to the Small Business Administration at maturity is a violation of the Small Business Act and the regulations adopted thereunder.

5. This Court further concludes as a matter of law that the aforesaid violation is sufficient to authorize this Court to issue an injunction and appoint a Receiver for Capital Assistance Corporation, and that the Small Business Administration in its sole discretion may revoke the license of Capital Assistance Corporation.

6. The Court further concludes as a matter of law that to approve or disapprove the extending of financing to the defendant by SBA is a discretionary action granted by statute to SBA.

7. The Court further concludes as a matter of law that SBA acted in a reasonable manner and within its discretionary authority in refusing to extend financing to the defendant.

8. The Court further concludes as a matter of law that the Court lacks jurisdiction to review the reasonable exercise of discretionary action of SBA.

9. The Court further concludes as a matter of law that the counterclaim of the defendant fails to state a claim upon which relief can be granted and that plaintiff and counterclaim defendant are entitled to an order dismissing said counterclaim in its entirety.

IT IS SO ORDERED THIS 6th day of March, 1969.

STANLEY A. WEIGEL,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1970